

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WILLIAM ROHRBACH,

Defendant-Appellant.

UNPUBLISHED

August 2, 2002

No. 231698

Monroe Circuit Court

LC No. 00-030757-FC

Before: Murray, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(f), for which he was sentenced to 17½ to 40 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the court erred in admitting evidence of his pending drunk driving charge. The court's ruling on the admission of other acts evidence is reviewed for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Under MRE 404(b)(1), evidence of other crimes, wrongs or acts is not admissible to prove the character of a person to show action in conformity therewith. Thus, if the sole purpose in offering the evidence is to show the defendant's propensity for particular conduct based on his character as inferred from other wrongful conduct, it is not admissible. *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). It is admissible, however, for another purpose, such as proof of opportunity or motive, if that purpose is material. MRE 404(b)(1).

Here, the evidence was not offered to prove that defendant was a criminal and acted in conformity with his criminal propensities by sexually assaulting his sister. The evidence was relevant to explain the context in which the subject of sex arose and in which the attack occurred. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). It was also relevant to prove that defendant had a motive for sexually assaulting his sister, with whom he had previously had a normal relationship, and to show that the act was not consensual. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). The evidence was minimally prejudicial, the other crime being a misdemeanor unrelated to criminal sexual conduct, and the court gave a special limiting instruction to ensure that the jury did not use the evidence for improper purposes. Therefore, the court did not abuse its discretion in admitting the evidence.

Defendant next contends that the court erred in finding substantial and compelling reasons to depart from the statutory sentencing guidelines. “The determination regarding the existence, or nonexistence, of a particular reason or factor is reviewed on appeal under the clearly erroneous standard.” *People v Perry*, 216 Mich App 277, 280; 549 NW2d 42 (1996). The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000). The trial court’s determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.*

The trial court imposed a minimum sentence that exceeded the upper end of the guidelines by two and one-half years. Assuming without deciding that defendant’s lack of remorse was not an objective and verifiable factor warranting a departure, the other factors cited by the court—that defendant attacked his own sister and exploited her willingness to help him with his problems to get her to his house—were objective and verifiable and provided a substantial and compelling reason for the departure. MCL 769.34(3); *Babcock, supra* at 75. We therefore affirm defendant’s sentence. *Id.* at 78.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Brian K. Zahra